Tan Yok Fong (Administratrix of the estate of Hwang Chuan Seng, decd) v Khoo Ban Kok & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 25–412 OF 1988
HAIDAR J
28 JULY 1994

***Civil Procedure** — Parties — Amending status of plaintiff — Writ named plaintiff as administratrix when letters of administration not extracted yet — Whether claim brought as administratrix or as dependant — Whether relief claimed and facts same — Whether proper issues were before the court — Rules of the High Court 1980 O 20 r 5*

The plaintiff sued the defendants as the 'administrator' of her late husband's estate when in actual fact, her claim was for loss of dependency under s 7 of the Civil Law Act 1956 ('the Act'). She applied to amend the writ and statement of claim to reflect her proper status as a dependant and the application was allowed by the senior assistant registrar ('the SAR') with costs in the cause. The defendants have appealed, contending that the plaintiff had sued as administratrix while lacking that capacity since the letters of administration had been extracted only after the writ was issued. The issue was whether at the time of the filing of the writ and the statement of claim, the plaintiff was suing in a representative capacity or as a dependant.

Held, dismissing the appeal:

(1) An examination of the writ and the statement of claim clearly showed that the plaintiff had filed the writ as a dependant under s 7 of the Act and not in a representative capacity under s 8, and that the words 'administratrix of the estate of Hwang Chuan Sang, deceased' were a misdescription.

(2) The plaintiff could have brought a dependancy claim from the beginning and the relief claimed was not different from the one already claimed and the facts were the same or substantially the same so that the proper/real issues were before the court for determination. Therefore, the amendment should be allowed.

(3) However, it was only fair that the defendants should be compensated in costs for the prejudice caused (O 20 r 5(1) of the Rules of the High Court 1980 ('the RHC')) and the costs should be borne by the plaintiff, both before the judge and the SAR.

Obiter:

Even if the plaintiff was suing in her capacity as administratrix, she was clothed with the capacity or status to file a writ once the letters of administration were granted. Furthermore, in view of O 20 r 5(4) of the RHC, the court had the power to alter the capacity of a party suing as administrator even if he acquired that capacity after the

commencement of the action, and even if the period of limitation had expired. A

[Bahasa Malaysia summary

Plaintif telah mendakwa defendan sebagai 'pentadbir' harta pusaka mendiang suaminya tetapi pada hakikatnya, tuntutan beliau adalah B untuk kehilangan tempat tanggungan di bawah s 7 Akta Undang-Undang Sivil 1956 ('Akta itu'). Beliau telah memohon untuk meminda writ dan pernyataan tuntutan untuk menunjukkan tarafnya yang betul sebagai seorang tanggungan dan permohonan itu telah dibenarkan oleh penolong kanan pendaftar ('PKP itu') dengan kos C mengikut kausa. Defendan telah membuat rayuan dan menegaskan bahawa plaintif telah mendakwa sebagai pentadbir semasa beliau tidak mempunyai keupayaan untuk bertindak sedemikian, kerana surat kuasa mentadbir hanya telah diambil selepas writ dikeluarkan. Isunya adalah sama ada apabila writ dan pernyataan tuntuan difailkan, plaintif telah mendakwa di dalam keupayaan berperwakilan atau D sebagai seorang tanggungan.

Diputuskan, menolak rayuan itu:

(1) Suatu pemeriksaan writ dan pernyataan tuntutan menunjukkan dengan jelas bahawa plaintif telah memfailkan writ itu sebagai E seorang tanggungan di bawah s 7 Akta itu dan bukan di dalam keupayaan berperwakilan di bawah s 8, dan bahawa perkataan 'pentadbir harta pusaka Hwang Chuan Sang, si mati' adalah suatu gambaran yang salah.

(2) Plaintif boleh membawa suatu tuntutan kehilangan tanggungan F dari mula-mula lagi dan relief yang dituntut tidak berbeza daripada relief yang telahpun dituntut dan fakta adalah sama atau sebahagian besarnya sama, dan oleh itu isu yang wajar atau betul berada di hadapan mahkamah untuk diputuskan. Dengan demikian, pindaan itu seharusnya dibenarkan.

G

(3) Bagaimanapun, adalah adil jika defendan mendapat pampasan dalam bentuk kos untuk kemudaratan yang telah diakibatkan (A 20 k 5(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT itu')) dan kedua-dua kos di hadapan hakim dan juga PKP mesti ditanggung oleh plaintif.

H

Obiter:

Meskipun plaintif mendakwa dalam keupayaannnya sebagai pentadbir, beliau diselubungi dengan keupayaan atau taraf untuk memfailkan writ itu sebaik sahaja surat kuasa mentadbir diberikan. Lebih-lebih lagi, memandangkan A 20 k 5(4) KMT itu, mahkamah mempunyai I kuasa untuk mengubah keupayaan sesuatu pihak yang mendakwa sebagai pentadbir walaupun beliau memperolehi keupayaan itu selepas tindakan itu dimulakan, dan walaupun tempoh had masa telah luput.]

Notes

For cases on amendment of parties, see 2 *Mallal's Digest* (4th Ed) paras 1583–1584.

Cases referred to

Ang Hoi Yin v Sim Sie Hau [1969] 2 MLJ 3 (distd)
Bowler v John Mowlem & Co Ltd [1954] 3 All ER 556; [1954] 1 WLR 1445 (folld)
Comptroller of Income Tax v Yan Tai Min [1965] 1 MLJ 255 (distd)
Govindasamy Pillay & Sons Ltd v Lok Seng Chai & Ors [1961] MLJ 89 (distd)
Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230 (refd)
Ruhani bte Nohiat & Anor v Abdul Karim bin Mat Ali & Anor [1993] 2 AMR 31 (refd)
Stebbings v Holst & Co Ltd [1953] 1 All ER 925; [1953] 1 WLR 603 (refd)

Legislation referred to

Civil Law Act 1956 ss 7, 8
Probate and Administration Act 1959
Rules of the High Court 1980 O 20 r 5(4)
Rules of the Supreme Court 1957

Ho Thian Cheh (*Ho Thian Cheh & Co*) for the plaintiff.
V Rajendran (*RK Nathan & Co*) for the defendant.

Cur Adv Vult

Haidar J: This is an appeal by the defendants against the decision of the learned senior assistant registrar given on 11 September 1991 (encl 45) whereby the application of the plaintiff for amendment of the writ of summons and the statement of claim dated 17 December 1988 (encl 41), was allowed with costs in the cause.

Basically, the amendment relates to the status or capacity of the plaintiff to sue. The original description of the plaintiff in the writ reads:

> Tan Yok Fong (f), the administratrix of the estate of Hwang Chuan Sang, deceased, suing for and on behalf of the dependants of the deceased, namely: (1) Tan Yok Fong (f); (2) Hwang Kai Sen @ An Choi Seng; and (3) Lee Hoi Chen (f).

Paragraph 1 of the statement of claim sets out the details of the dependants.

In the application, the proposed amendment of her status reads, 'Tan Yong Fong as a dependant of Hwang Chuan Sang, deceased'.

Paragraph 1 of the statement of claim was proposed to be amended accordingly. Other amendments are formal and consequential.

In her affidavit-in-support of her application for amendment (encl 40), she sets out two grounds, namely:

(7) As my claim is purely a dependancy claim within the ambit of s 7 of the Civil Law Act 1956 at the time of filing the writ of summons, the said description of me as the administratrix of the estate of Hwang Chuan Sang was wholly without basis and in any event unnecessary, having regard to the fact that the grant of letters of administration to the said estate was only extracted on 19 December 1988. A

(8) The parents of the deceased, Hwang Kai Sen @ An Choi Seng and Lee Hoi Chen (f), passed away on 22 April 1989 and 10 September 1990, respectively. B

She further added that the amendment will not cause any prejudice to the defendants and the amendments will ensure that the proper/real issues are before the court for determination. C

The issue is whether at the time of the filing of the writ and the statement of claim the plaintiff was suing in a representative capacity or by way of a dependancy claim. It was the contention of the counsel for the defendants that the plaintiff sued the defendants in the capacity of an administratrix and, therefore, did not have the capacity as the letters of administration were extracted only on 19 December 1988 — two days after the issue of the writ and hence the entire action was a nullity. He cited the cases of *Comptroller of Income Tax v Yan Tai Min* [1965] 1 MLJ 255; *Ang Hoi Yin v Sim Sie Hau* [1969] 2 MLJ 3; and *Govindasamy Pillay & Sons Ltd v Lok Seng Chai & Ors* [1961] MLJ 89 in support thereof. It is not disputed that although the petition for grant of letters of administration was granted on 6 July 1988, the relevant grant of letters of administration was only extracted on 19 December 1988. D E

According to the counsel for the plaintiff, a careful scrutiny of the writ and the statement of claim would show that the plaintiff was not suing in her capacity as the administratrix of the estate of Hwang Chuan Sang, deceased. It was contended that nowhere in the statement of claim is there any assertion that the plaintiff was suing as the administratrix of the estate of Hwang Chuan Sang, deceased, for the benefit of the said estate. A perusal of the statement of claim (paras 1, 5, 6 and 7) would seem to reveal that the plaintiff was claiming in her personal capacity as a dependant for damages and pecuniary loss in accordance with s 7 of the Civil Law Act 1956 ('the Act') dealing with dependancy claims. The plaintiff therefore contended that at most, the description of the plaintiff in this action as the administratrix is a misdescription and, therefore, does not make the writ a nullity and cited the case of *Bowler v John Mowlem & Co Ltd* [1954] 3 All ER 556; [1954] 1 WLR 1445 in support thereof. F G H

An examination of the writ and the statement of claim in this action, in my view, clearly shows that the plaintiff filed the writ for the benefit of herself as a dependant under the provisions of s 7 of the Act. If it is intended to be for the benefit of the estate of the deceased, Hwang Chuan Sang, it would have been brought under s 8 of the Act. As Lord Denning LJ said in *Bowler v John Mowlem & Co Ltd* ([1954] 3 All ER 556 at p 558; [1954] 1 WLR 1445 at p 1447): I

> It is true that the plaintiff described herself as administratrix in the title of the action and in the statement of claim, but a misdescription in the title is not fatal; it does not make a writ a nullity any more than does a misdescription

A of a woman as a spinster when she is in fact a married woman. A misdescription in the title is never fatal; it can always be cured by amendment in the same way as a misnomer. The thing which cannot be cured is the bringing of an action in a representative capacity when that capacity does not exist.

B What prompted the plaintiff to file the amendments was the notice given by the counsel for the defendants to question the capacity or status of the plaintiff to sue. Hence, the application of the plaintiff to make it clear in regard to her capacity or status to file the writ.

The authorities relied on by the counsel for the defendants are not relevant for the purpose of considering the issue of misdescription in the C title. In fact the argument of the counsel for the defendants could properly be described as a technicality with a vengeance (see *Stebbings v Holst & Co Ltd* [1953] 1 All ER 925 at p 926; [1953] 1 WLR 603 at p 605). On this ground alone, the plaintiff should succeed and the order made by the learned senior assistant registrar was a correct one except for costs which D I shall deal later in my judgment.

I do not, with respect, agree with the contention of the counsel for the defendants that the statement of claim here should be disregarded and it would make no difference so long as the title to the writ indicated that the plaintiff was suing in a representative capacity. In my view, an E examination of the statement of claim is relevant for the purpose of ascertaining whether the claim of the plaintiff that the words 'administratrix of the estate of Hwang Chuan Sang, deceased' were a misdescription. The statement of claim seems to support her claim that she was not suing in a representative capacity under the provisions of s 8 of the Act.

F Even assuming that the words 'the administratrix of the estate of Hwang Chuan Sang, deceased' must be construed to mean that the plaintiff was suing in the capacity of the administratrix of the estate of Hwang Chuan Sang, deceased, this called for a consideration of the case of *Ruhani bte Nohiat & Anor v Abdul Karim bin Mat Ali & Anor* [1993] 2 AMR 31 at p 1339 relied on by the counsel for the plaintiff. I was advised G by the counsel for the defendants that this case is pending appeal in the Supreme Court. Having read this case, I am inclined to agree with it as the learned judge had adequately considered the relevant sections of the Probate and Administration Act 1959 and the authorities relied on by the counsel for the defendants in this action when he held that it was sufficient H for the party to be clothed with the capacity or status to file a writ once the letters of administration is granted. It was unfortunate, perhaps, that the learned judge did not consider the effect of O 20 r 5(4) of the Rules of the High Court 1980 ('the RHC'). It should be borne in mind that the authorities relied on by the counsel for the defendants were decided under the old Rules of the Supreme Court 1957 in which there is no similar I provision as O 20 r 5(4) of the RHC.

Be that as it may, in view of O 20 r 5(4) of the RHC, the court has the power to alter the capacity in which a party sues as the administrator of the deceased, even if he has acquired that capacity after the commencement of the action, and further, even if the relevant period of

limitation has expired. According to *Bullen & Leake & Jacob's Precedents of Pleadings* (13th Ed) at p 373, the learned editors said: A

> The effect of this rule is that cases such as *Ingall v Moran* [1944] KB 160, which provided that an administrator could not commence an ordinary action for debt or damages until the letters of administration were issued, are now negatived. Thus it is only actions begun in the name of the deceased as plaintiff which are nullities, incapable of being cured by any of the court's present powers. B

In considering O 20 r 5 of the RHC (which has no similar provision in the previous Rules of the Supreme Court 1957 which have been repealed and replaced by the RHC) the Supreme Court in *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230 at p 232, Abdul Hamid Omar Ag LP, after citing the passages in a number of English authorities, stated: C

> From the passages cited above it is overwhelmingly clear that the underlying reasons governing the power under r 5 seem to be that if the proceedings had from the beginning been properly formulated and constituted in the circumstances specified in paras (3), (4) and (5) the defence of limitation would not have been available to the defendant, and accordingly the court, if in its discretion thinks it just to grant leave to amend defects in the writ or pleading within the scope of the circumstances specified in the paras, so that such defects in the proceedings are treated as having been cured ab initio ... . D

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Further on at p 232, Abdul Hamid Omar Ag LP said:

> ... the court has the power to grant an amendment after the expiry of the limitation period notwithstanding that the effect of the amendment will be to add or substitute a new cause of action subject to the one important condition, namely, that the new cause of action must arise out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed. F

In this action, the plaintiff could, as a widow, have sued for dependancy from the beginning of the proceedings and the relief claimed is not different from the one already claimed, except for the exclusion of the costs of grant of letters of administration, and the facts are the same or substantially the same so that the proper/real issues are before the court for determination. G

Clearly, therefore, the court in this case should see to the justice of the case and exercise its discretion by allowing the amendment but in doing so, it is trite law that it is only just that the defendants should be compensated in costs in any event for the prejudice thereby caused (see O 20 r 5(1) of the RHC). The defendants are given two weeks from the date of this order to file any amended defence as may be necessary. H

In the circumstances, I dismiss the appeal and affirm the order of the learned senior assistant registrar except as to costs which shall be borne by the plaintiff, both here and before the learned senior assistant registrar. I

Appeal dismissed.

Reported by Anne Khoo